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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 Marilyn A. Warren,

Civil No. 04-6391-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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1 AIKEN, Judge:

2 Claimant, Marilyn Warren, brings this action pursuant to
3 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
4 1383(c)(3), to obtain judicial review of a final decision of
5 the Commissioner. The Commissioner denied the plaintiff's
6 application for Supplemental Security Income (SSI) and
7 Disability Insurance Benefits (DIB) under Titles XVI and II of
8 the Social Security Act. 42 U.S.C. §§ 1381-83(f). For the
9 reasons set forth below, the Commissioner's decision is
10 remanded for further proceedings.

11 **PROCEDURAL BACKGROUND**

12 On October 23, 2001, the plaintiff filed applications for
13 DIB and SSI. Tr. 46-48, 380-82. The applications were denied
14 initially and on reconsideration. Tr. 35-39, 40-42, 384-88,
15 390-92. The plaintiff requested a hearing, which was held on
16 February 24, 2004. Tr. 396-424.

17 The ALJ issued a decision on April 30, 2004, finding that
18 the plaintiff was not disabled because she could perform her
19 past relevant work as a general clerk, a bookkeeper, and a
20 payroll clerk. Tr. 23, 24, Finding 7. The ALJ also found that
21 in the alternative, the plaintiff was not disabled because she
22 could perform other work existing in significant numbers in the
23 economy, such as a credit clerk and a sorter. Tr. 23, 24,
24 Finding 8.

25 The Appeals Council denied the plaintiff's request for
26 review, making the ALJ's decision the final decision of the
27 Commissioner. Tr. 9-11. See 20 C.F.R. §§ 404.210, 416.1481.

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The plaintiff alleged disability since July 1, 2000 due to chronic depression, a damaged heart valve, obesity, and high blood pressure. Tr. 46, 62, 380. The relevant medical evidence is discussed below.

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, the plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or

1 mental impairment which can be expected . . . to last for a
2 continuous period of not less than 12 months. . . ." 42 U.S.C.
3 § 423(d)(1)(A).

4 The Secretary has established a five-step sequential
5 process for determining whether a person is disabled. Bowen v.
6 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
7 416.920. First the Secretary determines whether a claimant is
8 engaged in "substantial gainful activity." If so, the claimant
9 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
10 §§ 404.1520(b), 416.920(b).

11 In step two the Secretary determines whether the claimant
12 has a "medically severe impairment or combination of
13 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
14 §§ 404.1520(c), 416.920(c). If not, the claimant is not
15 disabled.

16 In step three the Secretary determines whether the
17 impairment meets or equals "one of a number of listed
18 impairments that the Secretary acknowledges are so severe as to
19 preclude substantial gainful activity." Id.; see 20 C.F.R.
20 §§ 404.1520(d), 416.920(d). If so, the claimant is
21 conclusively presumed disabled; if not, the Secretary proceeds
22 to step four. Yuckert, 482 U.S. at 141.

23 In step four the Secretary determines whether the
24 claimant can still perform "past relevant work." 20 C.F.R.
25 §§ 404.1520(e), 416.920(e). If the claimant can work, she is
26 not disabled. If she cannot perform past relevant work, the
27 burden shifts to the Secretary.

28 In step five, the Secretary must establish that the

1 claimant can perform other work. Yuckert, 482 U.S. at 141-42;
2 see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the
3 Secretary meets this burden and proves that the claimant is
4 able to perform other work which exists in the national
5 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

6 In the plaintiff's case, the ALJ found at step one that
7 the plaintiff had not engaged in substantial gainful activity
8 since her alleged disability onset date. Tr. 18, 24, Finding
9 2. This finding is not in dispute.

10 At step two, the ALJ found that the plaintiff's
11 depression and valvular heart disease were a severe impairment
12 or combination of impairments. Tr. 21,24, Finding 3. This
13 finding is not in dispute.

14 At step three, the ALJ found that the plaintiff's
15 impairments did not meet or equal the requirements of a listed
16 impairment. Tr. 21, 24, Finding 4. This finding is in
17 dispute.

18 The ALJ determined that the plaintiff had the residual
19 functional capacity to perform unskilled to semiskilled work at
20 less than a full range of light and a full range of sedentary
21 exertional level, with limited interaction with the general
22 public. Tr. 22, 24, Finding 6. This finding is in dispute.

23 At step four, the ALJ found that the plaintiff could
24 perform her past relevant work as a general clerk, bookkeeper,
25 or payroll clerk. Tr. 23, 24, Finding 7. This finding is in
26 dispute.

27 At step five, the ALJ found that, based on the above
28 residual functional capacity, the plaintiff could perform work

1 as a credit clerk and sorter. Tr. 23, 24, Finding 8. This
2 finding is in dispute.

3 The plaintiff alleges that the ALJ erred by improperly
4 rejecting the opinion the plaintiff's treating psychiatrist,
5 improperly discrediting the plaintiff's testimony, and ignoring
6 relevant lay witness testimony.

7 DISCUSSION

8 The plaintiff argues that the ALJ improperly rejected the
9 September 12, 2001 opinion of Dr. Laramore, the plaintiff's
10 treating psychiatrist. Furthermore, the plaintiff notes an
11 August 10, 2004 opinion by the doctor, which was submitted to the
12 Appeals Council after the ALJ issued his decision and gives
13 updated information relevant to this decision. Tr. 395.

14 Evidence that was not before the ALJ should not lead to a
15 reversal of the ALJ's decision for a payment of benefits;
16 however, this new evidence may be reviewed to determine whether
17 a remand is necessary to allow the ALJ to further consider it.
18 Harman v. Apfel, 211 F.3d 1172, 1180 (9th Cir. 2000). The
19 decision to remand for further proceedings turns upon the likely
20 utility of such proceedings. Lewin v. Schweiker, 654 F.2d 631,
21 635 (9th Cir. 1981).

22 The fact that Dr. Laramore's opinion is that of a treating
23 physician weighs in favor of a remand being warranted. Treating
24 physicians are employed to cure and have greater opportunity to
25 know and observe their patients; as such their opinions are given
26 greater weight than opinions of other physicians. Rodriguez v.
27 Bowen, 876 F.2d 759, 761-62 (9th Cir. 1989). However, an ALJ
28 "need not accept a treating physician's opinion that is

1 conclusory and brief and unsupported by clinical findings."
2 Batson v. Comm'r. of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th
3 Cir. 2004). The defendant argues that Dr. Laramore's 2004
4 opinion is based solely on the plaintiff's self-reported history
5 and is without clinical substantiation, and therefore does not
6 warrant a remand.

7 However, clinical substantiation exists in the objective
8 evidence given by Dr. Laramore in reaching her opinion. The
9 doctor cited the plaintiff's family history of severe mental
10 illness. Tr. 395. The doctor's opinion that the plaintiff had
11 residual depressive symptoms of low motivation, procrastination,
12 low energy, and reluctance to be involved socially was supported
13 by objective evidence. Id. This evidence includes the plaintiff
14 failing to follow the doctor's advice to start going to the gym
15 for exercise; failing to attend a recommended depression support
16 group; procrastinating getting a volunteer job; stopping
17 participation in her Bible study group; and engaging in mostly
18 restricted and solitary activities, such as working on her
19 garden, reading, or working on her computer. Id. The doctor
20 also provided support for her opinion that the plaintiff
21 decompensates due to stress, citing the plaintiff's history of
22 short-lived jobs. Id. This objective evidence goes beyond the
23 alleged "self-reported" symptoms of depression. Therefore, this
24 opinion has evidentiary value.

25 Additionally, the testimony of the plaintiff's daughter,
26 which the ALJ failed to address, is relevant to the issue of the
27 plaintiff's history of decompensating due to job stress. In a
28 memorandum dated February 28, 2002, the plaintiff's daughter

1 stated that the plaintiff:

2 "is unable to cope with the normal stresses of the work
3 world in any capacity. The only time I have seen things
4 get better for her was when she was not under the stress of
5 working, no matter how insignificant or stress free the
6 type of job was deemed to be. I have seen her unable to
7 handle even the most menial positions that are often held
8 by high school students, who work while they are attending
9 school. The fact is that saying my mother may "have
10 limitations" is a huge understatement. More accurately,
11 her life becomes a wreck when she is exposed to the stress
12 of making a living." Tr. 118.

13 An ALJ is required to take into account lay testimony as to a
14 claimant's symptoms, unless he or she expressly determines to
15 disregard such testimony and gives reasons germane to each
16 witness for doing so. Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
17 2001). The ALJ erred by failing to give reasons explaining why
18 he disregarded the testimony of the plaintiff's daughter.

19 Generally, an ALJ must articulate grounds to discredit
20 testimony in the original decision. Varney v. Secretary of
21 Health and Human Services, 859 F.2d 1397, 1398-99 (9th Cir. 1988).
22 If it is clear that the ALJ would be required to award benefits
23 if the testimony were credited, the court will not remand solely
24 to allow the ALJ to make specific findings regarding that
25 testimony. McCartney v. Massanari, 298 F.3d 1072, 1076-77 (9th
26 Cir. 2002). In this case it is not clear that the ALJ would be
27 required to award benefits; furthermore, this court has
28 discretion to determine whether to "credit as true" or remand.
Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003). For the
reasons discussed below, this court finds that a remand is
appropriate.

The decision to remand for further proceedings turns upon
the likely utility of such proceedings. Lewin, 654 F.2d at 635.

1 According to Smolen v. Chater, further proceedings are
2 appropriate if outstanding issues must be resolved before a
3 determination of disability can be made. 80 F.3d 1273, 1292 (9th
4 Cir. 1996). The outstanding issues in the plaintiff's case are
5 whether the ALJ was correct in determining that the plaintiff's
6 depression and fatigue have improved since her successful gastric
7 surgery and subsequent weight loss.

8 In making this determination, the ALJ referred to Dr.
9 Laramore's 2001 letter and discredited it in part because since
10 that letter was written, the doctor's treatment notes show
11 improvement in the plaintiff's mood with respect to the
12 plaintiff's depression. Tr. 21. The ALJ also discredited
13 medical source opinions of the non-examining state medical
14 examiners, stating that these opinions were based only on
15 information contained in the record at the time of the state
16 agency reconsideration, and that additional medical evidence
17 received in the course of developing the claimant's case for
18 review justified a different conclusion than that of the
19 examiners. Tr. 22. The ALJ also discredited the plaintiff's
20 testimony, stating that her allegations were disproportionate to
21 the medical and psychological record. Id. The ALJ's conclusion
22 was that the plaintiff's depression is managed by medications, if
23 not in remission, and that any exacerbations of her fatigue
24 caused by obesity must have been lessened by the successful
25 gastric surgery and subsequent weight loss (at the time of the
26 hearing, the plaintiff reported losing 80 pounds). Tr. 22, 409.

27 In light of the August 2004 opinion of Dr. Laramore, a
28 remand would be useful in sorting out these issues. This opinion

1 stated that the plaintiff's depression was still a significant
2 factor preventing her from working. Tr. 395. This casts doubt
3 on the ALJ's conclusions that the plaintiff's depression was
4 under control and that the plaintiff's allegations were
5 disproportionate to the record. Also, on January 18, 2002, Dr.
6 Bates-Smith reviewed the plaintiff's medical records and
7 concluded "[s]ignificant fatigue is indicated and attributed to
8 heart condition (sic), while [the medical record] suggests this
9 is more a reflection of her depressive symptoms." Tr. 302. If
10 the plaintiff's depression is the major cause of her fatigue and
11 the depression is still not controlled, the ALJ erred in
12 concluding that the plaintiff's fatigue must have been lessened
13 by the plaintiff's weight loss.

14 A remand will allow the ALJ to take into consideration Dr.
15 Laramore's August 2004 letter to determine whether the complete
16 medical evidence justifies reaching the same conclusions about
17 the current status of the plaintiff's depression, the plaintiff's
18 credibility, and how the plaintiff's fatigue is impacted by her
19 weight loss. The ALJ also must comment on the lay testimony of
20 the plaintiff's daughter regarding the plaintiff's history of
21 decompensation due to job-related stress.

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CONCLUSION

The Commissioner's decision is therefore remanded for further proceedings.

IT IS SO ORDERED.

Dated this 7 day of September, 2005.



Ann Aiken
United States District Judge